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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 430

ARROW TRANSPORTATION COMPANY, a corporation,
O. J. WALLS, d/b/a O. J. WALLS COMPANY,
JOHN D. BAGWELL FARMS AND HATCHERY, INC., a corporation,
CITY OF GUNTERSVILLE, ALABAMA,
Petitioners

v.

SOUTHERN RAILWAY COMPANY, a corporation,
LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation,
SEABOARD AIR LINE RAILROAD COMPANY, a corporation,
Respondents

BRIEF FOR THE PETITIONERS

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Question Presented	2
Statement	3
Summary of Argument	8
Argument	9
I. An equity court has inherent power to prevent irreparable injury by preserving the status quo pending the outcome of a proceeding before an administrative agency, where the agency is without power or has exhausted its power to do so	11
II. Congress has not abrogated equity's inherent power to grant ancillary injunctive relief in the circumstances here presented	16
III. To construe Section 15(7) as prohibiting ancillary injunctive relief would raise grave constitutional difficulties	29
Conclusion	31
Appendix A—National Transportation Policy; Interstate Commerce Act, Section 15(7) and Section 22(1)	1a
Appendix B—Chart	5a
Appendix C—Excerpts from Congressional Debates	7a

CITATIONS

CASES: Page

American Barge Line Co. v. *Alabama G. S. R. Co.*, 306 I.C.C. 167 (1959) 3

Anniston Manufacturing Co. v. *Davis*, 301 U.S. 337 (1937) 30

A.P.W. Paper Co. Inc. v. *Riley*, 12 F. Supp. 738 (N.D. N.Y. 1935) 30

Arrow Transportation Co v. *United States*, 176 F. Supp. 411 (N.D. Ala. 1959), *aff'd per curiam*, 361 U.S. 353 (1960) 3, 9, 24

Association of Westinghouse Salaried Employees v. *Westinghouse Electric Corp.*, 348 U.S. 437 (1955) 16

Atchison T. & S.F. Ry. Co. v. *United States*, 194 F. Supp. 438 (D. Kan. 1961) 3, 9

Atlantic Coast Line R. Co. v. *Macon Grocery Co.*, 166 Fed. 206 (5th Cir. 1909), (reversing 163 Fed. 738 (C.C.S.D. Ga. 1908)), *aff'd on other grounds*, 215 U.S. 501 (1910) 12

Battaglia v. *General Motors Corp.*, 169 F. 2d 254 (2nd Cir. 1948) *cert. denied*, 335 U.S. 887 (1948) 30

Board of Governors of Federal Reserve System v. *Transamerica Corp.*, 184 F. 2d 311 (9th Cir. (1950) 13

Board of Railroad Commissioners v. *Great Northern Ry. Co.*, 281 U.S. 412 (1930) 14

Borden's Farm Products Co. v. *Ten Eyck*, 297 U.S 251 (1936) 11

Boston Sand Co. v. *United States*, 278 U.S. 41 (1928) 16

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673 (1930) 30

Bronemann v. *United States*, 138 F. 2d 333 (8th Cir. 1943) 30

Buskirk v. *King*, 72 Fed. 22 (4th Cir. 1896) 11

Cantlay & Tanzola, Inc. v. *United States*, 115 F. Supp. 72 (S.D. Cal. 1953) 13, 29

Cary v. *Curtis*, 3 How. (U.S.) 236 (1845) 30

Charlotte, C. & A. R. Co. v. *Gibbes*, 142 U.S. 386 (1892) 27

Chicago, M. & St. P. Ry. Co. v. *Minnesota*, 134 U.S. 418 (1890) 31

Coe & Wilson v. *Louisville & N. R. Co.*, 3 Fed. 775 (C.C.M.D. Tenn. 1880) 27

Columbus Iron & Steel Co. v. *Kanawha & M. Ry. Co.*, 178 Fed. 261 (4th Cir. 1910) 12

Page

Crosse & Blackwell Co. v. *Federal Trade Commission*, 262 F. 2d 600 (4th Cir. 1959) 16
Eastern States Petroleum Corp. v. *Rogers*, 280 F. 2d 611 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 891 (1960) 30
Ehrardt v. *Boaro*, 113 U.S. 537 (1885) 11
Elliott v. *Rich*, 24 N.M. 52, 172 Pac. 194 (1918) 12
Flight Engineers' Inter'l Ass'n v. *American Airlines, Inc.*, 303 F. 2d 5 (5th Cir. 1962) 13
Frost v. *Corporation Commission*, 278 U.S. 515 (1929) 30
Frye & Co. v. *Vierhus*, 12 F. Supp. 597 (W.D. Wash 1935) 30
Graham & Foster v. *Goodcell*, 282 U.S. 409 (1931) 30
Great Atlantic & Pacific Tea Co. v. *Grosjean*, 301 U.S. 412 (1937) 11
Great Northern Ry. Co. v. *United States*, 315 U.S. 262 (1942) 25
Houston Coal & Coke Co. v. *Norfolk & W. Ry Co.*, 171 Fed. 723 (C.C.W.D. Va. 1909), *aff'd per curiam*, 178 Fed. 266 (4th Cir. 1910) 12
Inland Milling Co. v. *Huston*, 12 F. Supp. 554 (S.D. Ia. 1935) 30
Isbrandtsen Co. v. *United States*, 81 F. Supp. 544 (S.D. N.Y. 1948), *appeal dismissed*, 336 U.S. 941 (1949) 13
Jewett Bros. & Jewett v. *Chicago, M. & St. P. Ry. Co.*, 156 Fed. 160 (C.C.D. S.D. 1907) 12
Kalispell Lumber Co. v. *Great Northern Ry. Co.*, 165 Fed. 25 (9th Cir. 1908) 12
Knapp, Stout & Co. v. *McCaffrey*, 177 U.S. 638 (1900) 26
Liggett Co. v. *Baldridge*, 278 U.S. 105 (1928) 30
Lockerty v. *Phillips*, 319 U.S. 182 (1943) 30
Lynch v. *United States*, 292 U.S. 571 (1934) 30
Markham v. *Cabell*, 326 U.S. 404 (1945) 16
Martin v. *Superior Court*, 176 Cal. 289, 168 Pac. 135 (1917) 26
M. C. Kiser Co. v. *Central of Ga. Ry. Co.*, 158 Fed. 193 (C.C.N.D. Ga 1907) 12
Menacho v. *Ward*, 27 Fed. 529 (C.C.S.D. N.Y. 1886) .. 27
Miller v. *Howe Sound Min. Co.*, 77 F. Supp. 540 (E.D. Wash. 1948) 30
Montana State Federation of Labor v. *School Dis. No. 1*, 7 F. Supp. 82 (D. Month. 1934) 13

Page

Munn v. *Illinois*, 94 U.S. 113 (1876) 27
Northern Pac. Ry. Co. v. *Pacific Coast Lumber Mfrs.' Ass'n*, 165 Fed. 1 (9th Cir. 1908) 12
Northern Pac. Ry. Co. v. *Soderberg*, 86 Fed. 49 (C.C.D. Wash. 1898) 11
Oklahoma Natural Gas Co. v. *Russell*, 261 U.S. 290 (1923) 30, 31
Olive Land & Development Co. v. *Olmstead*, 103 Fed. 568 (C.C.S.D. Cal. 1900) 11
Pacific Inland Tariff Bureau v. *United States*, 129 F. Supp. 472 (D. Ore. 1955) 13, 29, 31
Pacific Tel. & Tel. Co. v. *Kuykendall*, 265 U.S. 196 (1924) 30, 31
Pennsylvania Motor Truck Ass'n v. *Port of Philadelphia Marine Terminal Ass'n*, 183 F. Supp. 910 (E.D. Pa. 1960) 13
Pennsylvania v. *Nelson*, 350 U.S. 497 (1956) 30
Peter Pan Fabrics, Inc. v. *Martin Weiner Corp.*, 274 F.2d 487 (2nd Cir. 1960) 16
Petroleum Products from New Orleans, La., Group, 194 I.C.C. 31 (1933) 10
Porter v. *Investors Syndicate*, 286 U.S. 461 (1932) 30
Recher v. *Rossell*, 91 F. Supp. 108 (S.D.N.Y. 1950) .. 13
Scripps-Howard Radio, Inc. v. *Federal Communications Commission*, 316 U.S. 4 (1942) 15, 17
Smith v. *Highway Board*, 117 Vt. 343, 91 A.2d 805 (1952) 13
State ex rel. Tidewater Shaver Barge Lines v. *Dobson*, 195 Ore. 533, 245 P.2d 903 (1952) 13
Tennessee Valley Authority v. *United States*, 96 F. Supp. 409 (N.D. Ala. 1951) 9
Texas & P. Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) 28
Tift v. *Southern Ry. Co.*, 123 Fed. 789 (C.C.S.D. Ga. 1903), *aff'd on other grounds*, 206 U.S. 428 (1907) 12
Tiger v. *Western Investment Co.*, 221 U.S. 286 (1911) 25
Trustees of Dartmouth College v. *Woodward*, 4 Wheat. (U.S.) 518 (1814) 31
United States ex rel. Atty. Gen. v. *Delaware & Hudson Co.*, 213 U.S. 366 (1909) 30
United States v. *Michigan Cent. R. Co.*, 122 Fed. 544 (C.C.N.D. Ill. 1903) 12
United States v. *Morgan*, 307 U.S. 183 (1939) 31

Page

United States v. *Stewart*, 311 U.S. 60 (1940) 25
United States Trucking Corp. v. *American Export Lines, Inc.*, 146 F. Supp. 924 (S.D. N.Y. 1956) ... 13
United States v. *Western P. R. Co.*, 352 U.S. 59 (1956) 15
Wallula Pac. Ry. Co. v. *Portland & S. Ry. Co.*, 154 Fed. 902 (C.C.E.D. Wash. 1906) 12
West India Freight & Steamship Co., Inc. v. *Seatrain Lines, Inc.*, 170 F.2d 775 (2nd Cir. 1948), *cert. dismissed*, 336 U.S. 908 (1949) 13
Wickwire Steel Co. v. *New York Cent. & H. R. Co.*, 181 Fed. 316 (2nd Cir. 1910) 12
Wood v. *Braxton*, 54 Fed. 1005 (C.C.D. W. Va. 1892) 11

STATUTES:

Esch-Cummins Act, 41 Stat. 487 ..... 17, 20, 21
Mann-Elkins Act, 36 Stat. 552 ..... 12, 17, 18, 7a
Mayfield-Newton Act, 44 Stat. 1446 22
National Transportation Policy, 54 Stat. 899, Note preceding 49 U.S.C. § 1 ..... 2, 3, 6, 9, 10, 23, 24, 25, 28, 31, App. A
Transportation Act of 1940, 54 Stat. 899 ..... 23, 24
24 Stat. 387, 49 U.S.C. § 22(4) ..... 2, 23, 25, 26, 28, App. A
44 Stat. 1447-8, 49 U.S.C. § 15(7) ..... 2, 6, 8, 9, 16, 17, 23, 25, 29, 30, App. A
62 Stat. 928, 28 U.S.C. § 1254(1) 2
62 Stat. 970, 28 U.S.C. § 2324 28
62 Stat. 970, 28 U.S.C. § 2325 28

MISCELLANEOUS:

28 Am. Jur., *Injunctions*, § 16 (1959) 11
43 C.J.S., *Injunctions*, § 13 (1945) 11
Hart & Wechsler, *Federal Courts and the Federal System*, (1953) 30
Annot., 38 L.R.A. (N.S.) 228 (1912) 11
49 Col. L. Rev. 1124 (1949) 16
45 Cong. Rec. ..... 18, 19, App. C (1), (2), (3)
59 Cong. Rec. ..... 22, App. C (4)

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

None of the opinions below has been officially reported. The Memorandum opinion of the District Court, dated August 2, 1962, appears at R. 52-55. The District Court's Findings of Fact, Conclusions of Law

and Order denying petitioner's motion for preliminary injunction, dated August 3, 1962, appear at R. 55-58. The Court of Appeals' opinion and its judgment of affirmance here under review were entered on September 7, 1962, and appear, respectively, at R. 116-125 and R. 126.

JURISDICTION

This case is before this Court for review pursuant to a Writ of Certiorari granted on October 15, 1962 (R. 143). Mr. Justice Black ordered petitioners to file their Petition for Writ of Certiorari within thirty days after August 17, 1962 (R. 104). It was filed on September 14 and was supplemented on September 18, 1962. The judgment here under review is dated September 7, 1962 (R. 126). The jurisdiction of this Court rests on 62 Stat. 928, 28 U.S.C., Section 1254 (1).

STATUTES INVOLVED

The statutes involved are Section 15(7) of the Interstate Commerce Act (44 Stat. 1447-1448, as amended; 49 U.S.C. § 15(7)), the second restriction of Section 22(1) of the Interstate Commerce Act (24 Stat. 387, as amended; 49 U.S.C. § 22(1)), and the National Transportation Policy (54 Stat. 899; Note preceding 49 U.S.C. § 1). The texts of these statutes are set forth in Appendix A.

QUESTION PRESENTED

Whether a District Court is powerless to prevent irreparable injury to shippers, port cities, and competing barge lines by temporarily enjoining a railroad from putting rates into effect until the Interstate Commerce Commission can complete an investigation and render a final decision as to their lawful-

ness in a situation in which the Commission has suspended the proposed rates on the ground that "there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy . . .", but has been unable to complete its investigation within the suspension period and is without further power to suspend the rates.

STATEMENT

The Tennessee River in its natural state was a series of rapids and shoals unsuited for modern navigation. The Construction of a series of dams by the Tennessee Valley Authority has provided a modern waterway well suited for the movement of grain from the surplus-producing areas of the Midwest to the deficit areas of the Southeast. This is illustrated by the chart attached as Appendix B. With the coming of barge transportation, a large poultry industry developed in Georgia and Alabama and a milling industry grew up rapidly at points on the Tennessee River, particularly Chattanooga, Tennessee, and Guntersville, Alabama. Grain is shipped to these two river ports by barge and is subsequently reshipped to its ultimate destination, either as grain or grain products.[1]

[1] See *Arrow Transportation Co.* v. *United States*, 176 F. Supp. 411 (N.D. Ala. 1959), *aff'd per curiam*, 361 U.S. 353 (1960); *Atchison, T. & S.F. Ry. Co.* v. *United States*, 194 F. Supp. 438 (D. Kan. 1961); *American Barge Line Co.* v. *Alabama G. S. R. Co.*, 306 I.C.C. 167, 174 (1959).

The movement of grain has become a major part of the total barging service on the Tennessee River; in the case of petitioner Arrow Transportation Company, a certificated common carrier, the movement of grain accounted in 1960 for 68 percent of its total tonnage and more than 80 percent of its total revenues (R. 33). The railroads sought for many years to impede the barge movement of grain by charging higher rates on grain outbound from the Tennessee River ports when the grain had arrived at those ports by barge than when it had arrived by rail. After lengthy litigation, this practice was declared unlawful (see cases cited in footnote 1).

The Southern Railway then resorted to a new tactic. In July, 1961, it published reduced rail rates on grain from St. Louis, Cairo, Memphis, Evansville, Louisville, and Cincinnati to selected destinations in the Southeast. The proposed rates are on three different levels applicable to minimum shipments of 450, 900, and 1800 tons, respectively (R. 35). They average less than 40 percent of the presently existing rates (R. 36). The costs which the railroads would incur in handling this traffic are, of course, disputed, but the District Court had before it the affidavit of a nationally recognized cost expert that the revenues which the railroads would receive under the proposed new rates would average, for all of the routes involved, only 84 percent of their out-of-pocket costs (R. 42-43).

The effect of the proposed rail rates on the barge movement can be illustrated by a single example.

The rail distance from St. Louis to Birmingham is 472 miles and the present all-rail rate is $8.70. The proposed rate is $3.12, a 64 percent reduction. The barge-rail charges via Guntersville amount to $5.48,

consisting of $2.39 for the 586-mile barge haul from St. Louis to Guntersville, $2.20 for the 71-mile rail haul from Guntersville to Birmingham (which would not be reduced), and an 89¢ charge for the transfer from barge to rail car. Hence, the all-rail rate would be $2.36 per ton cheaper than the barge-rail charges, and, in order for Arrow to compete, it would have to reduce its rate on the barge leg of the movement from $2.39 to 3 cents per ton (R. 36). Arrow could not compete on movements from St. Louis or Evansville to most destinations in the Southeast if it furnished the barge transportation without charge (R. 36). The destructive effective of such rates on barge lines, and on mills at the Tennessee River ports whose operations are geared to barge service, is obvious (R. 33-34, 43-46).

The injury to small shippers at interior points who can use only a single carload of grain at a time is equally obvious. Because of their size they would not be able to use the new rail rates; using the old single-car all-rail rates (averaging two and one-half times the multi-car rates) they could not possibly compete with the larger shippers who could take advantage of the new rates (R. 38-39).

The effects on a port city like Guntersville, where a milling industry based on the barge movement is of prime economic importance, would also be very serious (R. 39-41).

Protests against the proposed new rates were filed with the Interstate Commerce Commission by various water carriers, shippers, and others. The Commission found "reason to believe that [the proposed rates] would, if permitted to become effective, result in rates and charges, rules, regulations, or practices which would be unjust and unreasonable in violation of the

Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy.'" The Commission ordered them suspended, pending investigation, for 7 months R. 56-57), the maximum period for which it could order suspension under Section 15 (7) of the Interstate Commerce Act. The investigation hearings were to begin in October, 1961 (R. 57), but were postponed to January 6, 1962, at Southern's request because of a change of counsel; and after the hearings began, illness of Southern's counsel interrupted their progress for 30 days. Compensation for these delays necessitated a voluntary extension of the suspension period to August 7, 1962 (R. 16, 57).

When it became apparent that the Commission could not reach a final decision by August 7, 1962, the protestants asked Southern further to postpone the effective date of the proposed rates until the Commission could act (R. 57). Southern refused (R. 8, 57).

On July 27, 1962, petitioners filed their verified complaint in the District Court, requesting a status quo injunction restraining the railroads from placing the proposed rates into effect until the Commission could pass on their lawfulness (R. 4-15). Supporting affidavits were filed dealing with the destructive and discriminatory nature of the proposed rates, the extent of the injuries they would inflict upon petitioners, and the relationship of the rates to the railroads' costs (R. 32-46). Southern filed an answer (R. 48-52), a motion to dismiss (R. 47), and counter affidavits (R. 15-32).[2] The other respondents entered appearances but filed no responsive pleadings (R. 55).

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[2] The order of the supporting affidavits and counter affidavits has been transposed in the record.

A hearing was held by the District Court on August 1, 1962, with all parties relying upon the affidavits and verified pleadings and introducing no additional evidence (R. 56). On August 2, 1962, the Court filed a Memorandum opinion (R. 52-55), in which it stated:

> "At this time I am of the opinion that the ends of justice would be best served by granting temporary injunctive relief for a limited period of time, not to urge the Commission to greater speed in determining this issue but to be sure that the parties conclude the hearings as speedily as possible. However, lacking jurisdiction, I find myself powerless to grant the relief sought; therefore, at this time it is the judgment of the Court that the motion for preliminary injunction be, and the same is hereby denied. At the same time I am denying defendants' motion to dismiss this case" (R. 54-55).

On August 3, 1962, the Court entered Findings of Fact, Conclusions of Law and Order (R. 55). It specifically found (a) requisite diversity of citizenship and amount in controversy; (b) jurisdiction of the parties; (c) grave danger of irreparable injury, loss, or damage; and (d) absence of an adequate remedy at law (R. 55-58), but denied a preliminary injunction on the ground indicated in its Memorandum opinion.

Petitioners filed a notice of appeal (R. 61) and obtained a temporary restraining order pending a hearing before the Court of Appeals for the Fifth Circuit (R. 67); on August 8, 1962, a two-judge panel of the Court of Appeals denied petitioners' motion for a status quo injunction pending decision on the appeal from the District Court, but continued the restraining order to give petitioners an opportunity to seek relief from this Court (R. 100); on August 17, 1962,

Mr. Justice Black extended the temporary restraining order pending final decision in this Court on the question of the District Court's jurisdiction (R. 101-105); on September 7, 1962, the Court of Appeals entered its opinion (R. 116-125) and judgment (R. 126) affirming the District Court but staying issuance of the mandate of affirmance for 21 days; and on September 26, Mr. Justice Black ordered that the status quo be preserved "pending final disposition in this Court of all matters in all the proceedings in this case or cases . . ."

SUMMARY OF ARGUMENT

The proposed rates are presumptively unlawful. If they go into effect, petitioners will suffer irreparable injury (amounting, according to the affidavits, to a deprivation of property) for which they have no adequate remedy at law.

An equity court possesses inherent power to prevent irreparable injury by issuing a temporary injunction to preserve the status quo pending the outcome of a proceeding in another forum, where the other forum is powerless to grant such relief. The inherent power to grant ancillary relief exists equally whether the other forum is a court or an administrative agency. The granting of ancillary relief does not interfere with the primary jurisdiction of the forum in which the principal action is pending, but on the contrary protects the primary jurisdiction and insures that it will be effective.

Contrary to the holding below, Section 15 (7) of the Interstate Commerce Act has not ousted the courts of their inherent power to provide ancillary relief in a case like that at bar. This section deals only with the power of the Interstate Commerce Commission.

It imposes a time limit within which the Commission may order suspension of proposed rate reductions, but does not affect the power of an equity court to enjoin them for a further period. To construe Section 15 (7) otherwise, particularly when read in conjunction with the National Transportation Policy, would defeat the intent and purpose of Congress and would give rise to grave constitutional questions.

ARGUMENT

This case brings before the Court the latest episode in the war of extermination being waged by the Southern Railway against barge transportation on the Tennessee River. Other facets of this struggle have been before the courts in *Arrow Transportation Co.* v. *United States, supra; Atchison, T. & S. F. Ry. Co.* v. *United States, supra; and Tennessee Valley Authority* v. *United States*, 96 F. Supp. 409 (N.D. Ala. 1951).

The objective of the Southern is nothing less than the destruction of the Tennessee River as an artery of commerce, with the incidental destruction of industries that have settled on the Tennessee River in order to enjoy the advantages of barge transportation, and grave injury to the cities whose economic welfare depends upon barge transportation. It must be remembered that railroads always have it in their power to destroy a barge line with which they compete unless restrained by the Commission or the courts. The technique is illustrated by the present case. Grain carried to destinations which can also be reached by barge represents a minuscule percentage of the freight revenues of the Southern Railway. Grain carried to destinations which can also be reached by rail represents 80 percent of the freight revenue of the Arrow Trans-

portation Company. This makes it possible for a railroad like the Southern to destroy its barge competition at any time by cutting rates on its barge-competitive traffic long enough to achieve its objective[3] unless restrained from so doing by the Commission or the courts. If the reductions in rates are such as to arouse widespread opposition and to require an extended hearing, a railroad has the power, unless restrained by the courts, to destroy the barge competition before the Commission can complete its investigation and rule on the lawfulness of the rates.

While this background is important to an understanding of the present case, the issue presented to the Court at this time is a narrow one. The Commission has found that there is reason to believe that the proposed rates are unlawful. The District Court has made all the findings necessary for the granting of a temporary injunction except the finding of jurisdic-

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[3] This method of destroying barge competition is not new; railroads have employed it in the past with great success. Its use was described by Commissioner Eastman in *Petroleum Products from New Orleans, La., Group*, 194 I.C.C. 31 (1933):

"The railroads in their early years encountered stiff competition from many steamboat lines plying upon these waters, and they proceeded to meet this competition ruthlessly. Eventually they swept the waters clean of the competing craft, except on the ocean and the Gulf, and even there the competition was greatly weakened.

"This was done by cutting rates where the competition existed, to whatever extent was necessary to paralyze it, at the same time maintaining rates at a very high level elsewhere. The steamboats did not have their reservoir of noncompetitive traffic to help them out, and hence perished in the unequal struggle" (p. 44).

One of the principal purposes of Congress in enacting the National Transportation Policy in 1940 was to prevent just this sort of destructive rate cutting. See *infra*, p. 23, et seq.

tion to issue it.[4] For the purposes of the present case, therefore, it must be assumed that the rates proposed by the Southern will ultimately be found unlawful, that the petitioners will suffer irreparable injury if the rates go into effect, and that equitable considerations require that the rates be enjoined. This leaves a single issue—whether the District Court has power to grant the relief sought by petitioners.

I.

An Equity Court Has Inherent Power to Prevent Irreparable Injury By Preserving the Status Quo Pending the Outcome of a Proceeding Before an Administrative Agency, Where the Agency Is Without Power or Has Exhausted Its Power to Do So

The power of equity to preserve the status quo, by means of a temporary injunction, pending the outcome of a proceeding in another forum has long been recognized. *Ehrardt* v. *Boaro*, 113 U.S. 537 (1885); *Buskirk* v. *King*, 72 Fed 22 (4th Cir. 1896); *Wood* v. *Braxton*, 54 Fed. 1005 (C.C.D. W. Va. 1892); Annot., 38 L.R.A. (N.S.) 228 (1912); 43 C.J.S., *Injunctions*, § 13 (1945); 28 Am. Jur., *Injunctions*, § 16 (1959).

There is no apparent reason why this inherent ancillary jurisdiction of equity courts should be affected by the fact that the other forum is a regulatory agency rather than another court, and the early cases assumed that ancillary injunctive relief was as appropriate in the one case as in the other. *Northern Pac. Ry. Co.* v. *Soderberg*, 86 Fed. 49 (C.C.D. Wash. 1898); *Olive Land & Development Co.* v. *Olmstead*, 103 Fed. 568

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[4] The findings of the District Court are supported by substantial evidence of record in the form of affidavits (R. 32-46). See *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U.S. 412, 420 (1937); *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U.S. 251, 261 (1936).

(C.C.S.D. Cal. 1900); *Elliott* v. *Rich*, 24 N.M. 52, 172 Pac. 194 (1918); *cf. Wallula Pac. Ry. Co.* v. *Portland & S. Ry. Co.*, 154 Fed. 902 (C.C.E.D. Wash. 1906).

Nevertheless, a conflict of authority developed when the question arose in connection with proceedings before the Interstate Commerce Commission. Prior to enactment of the 1910 amendments to the Interstate Commerce Act (the Mann-Elkins Act, 36 Stat. 552), the Commission had no power to suspend new rates for any period while investigating their lawfulness. In these circumstances, equitable jurisdiction to preserve the status quo pending the Commission's decision was either exercised, or recognized to exist though not exercised because of the particular facts involved, in *Northern Pac. Ry. Co.* v. *Pacific Coast Lumber Mfrs.' Ass'n* 165 Fed. 1 (9th Cir. 1908); *M. C. Kiser Co.* v. *Central of Georgia Ry. Co.*, 158 Fed. 193 (C.C. N.D. Ga. 1907); *Tift* v. *Southern Ry. Co.*, 123 Fed. 789 (C.C.S.D. Ga. 1903), *aff'd on other grounds*, 206 U.S. 428 (1907); *Kalispell Lumber Co.* v. *Great Northern Ry. Co.*, 165 Fed. 25 (9th Cir. 1908); and *Jewett Bros. & Jewett* v. *Chicago, M. & St. P. Ry. Co.*, 156 Fed. 160 (C.C.D. S.D. 1907); *cf. United States* v. *Michigan Cent. R. Co.*, 122 Fed. 544 (C.C.N.D. Ill. 1903). The contrary view was taken in *Atlantic Coast Line R. Co.* v. *Macon Grocery Co.*, 166 Fed. 206 (5th Cir. 1909) (reversing 163 Fed. 738 (C.C.S.D. Ga. 1908)), *aff'd on other grounds*, 215 U.S. 501 (1910); *Wickwire Steel Co.* v. *New York Cent. & H. R. Co.*, 181 Fed. 316 (2nd Cir. 1910); *Columbus Iron & Steel Co.* v. *Kanawha & M. Ry. Co.*, 178 Fed. 261 (4th Cir. 1910); and *Houston Coal & Coke Co.* v. *Norfolk & W. Ry. Co.*, 171 Fed. 723 (C.C.W.D. Va. 1909), *aff'd per curiam*, 178 Fed 266 (4th Cir. 1910).

Modern decisions have reasserted the traditional equitable jurisdiction, and the courts have frequently intervened in recent years to order maintenance of the status quo during administrative proceedings in order to aid the administrative agency's primary jurisdiction and render its ultimate decision effective. See *West India Fruit & Steamship Co., Inc.* v. *Seatrain Lines, Inc.*, 170 F. 2d 775 (2nd Cir. 1948), *cert. dismissed*, 336 U.S. 908 (1949); *Isbrandtsen Co.* v. *United States*, 81 F. Supp. 544 (S.D. N.Y. 1948), *appeal dismissed*, 336 U.S. 941 (1949); *Pacific Inland Tariff Bureau* v. *United States*, 129 F. Supp. 472 (D. Ore. 1955); *Cantlay & Tanzola, Inc.* v. *United States*, 115 F. Supp. 72 (S.D. Cal. 1953); *Pennsylvania Motor Truck Ass'n* v. *Port of Philadelphia Marine Terminal Ass'n*, 183 F. Supp. 910 (E.D. Pa. 1960); *Reeber* v. *Rossell*, 91 F. Supp. 108 (S.D. N.Y. 1950); *Montana State Federation of Labor* v. *School Dis. No. 1*, 7 F. Supp. 82 (D. Mont. 1934); *State ex rel. Tidewater Shaver Barge Lines* v. *Dobson*, 195 Ore. 533, 245 P. 2d 903 (1952); *cf. Board of Governors of Federal Reserve System* v. *Transamerica Corp.*, 184 F. 2d 311 (9th Cir. 1950); *Flight Engineers' Int'l Ass'n* v. *American Airlines, Inc.*, 303 F. 2d 5 (5th Cir., 1962); *United States Trucking Corp.* v. *American Export Lines, Inc.*, 146 F. Supp. 924 (S.D. N.Y. 1956); *Smith* v. *Highway Board*, 117 Vt. 343, 352-53, 91 A.2d 805, 812 (1952).

The Court below refused to follow these precedents. Starting with the premise that the power to prescribe rates to be charged in the future is a legislative function, it jumped to the conclusion that any suspension or restraint of a proposed rate is also an exclusively

legislative function (R. 121). In arriving at this conclusion, which is both a non-sequitur and directly contrary to a number of the cases in the group last cited, it relied on a dictum in *Board of Railroad Commissioners* v. *Great Northern Ry. Co.*, 281 U.S. 412 (1930). In that case the court referred to the conflict in the lower federal court cases as to the propriety of enjoining railroad rates pending decision of the Interstate Commerce Commission and referred with apparent approval to the cases denying the existence of jurisdiction as representing "the weight of decision". The holding in this case, however, was simply that a 10% reduction in intrastate rates, ordered by a state commission and not alleged to be confiscatory, could not be temporarily enjoined pending a decision as to whether such rates unjustly discriminated against interstate commerce. The court was dealing with a delicate problem in the field of federal-state relationships and its decision was based on the inappropriateness of judicial interference with "state action within its normal field, in relation to the domestic concern of transportation exclusively intra-state", in advance of even a preliminary ruling by the Commission that there was unjust discrimination against interstate commerce.

The dictum relied on by the Court below appears to be clearly out of harmony with established equitable principles. It was apparently based on an unwarranted and unfortunate application of the doctrine of primary jurisdiction. That doctrine is basically a rule of convenience adopted by the courts to avoid conflicts with administrative agencies and to insure uniformity in the interpretation and application of regu-

latory statutes.[5] The reasons for applying the doctrine are wholly absent in the present case where no possible conflict exists between the court and the agency. On the contrary, action by the court is necessary to protect and preserve the primary jurisdiction of the Interstate Commerce Commission by preventing acts which would render that primary jurisdiction ineffective. If the proposed rates become effective, the petitioners' businesses and interests will be destroyed and the Commission will have been rendered powerless to grant them any effective relief.

The choice here presented is between applying a rule of convenience in a situation where the reason for the rule does not exist or applying the equitable rule based on elementary considerations of justice that courts have inherent power to prevent irreparable injury by enjoining presumptively unlawful acts until their lawfulness can be determined.

This conflict was resolved in a related situation in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4 (1942). It was there held that a court reviewing an order of an administrative agency has inherent power, without express statutory authorization, to render its own jurisdiction effective by preserving the status quo pending the outcome of its review. The court stated, in substance, that traditional judicial powers not necessarily inconsistent with the functioning of administrative machinery are not to be deemed abrogated merely because such ma-

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[5] See *United States* v. *Western P. R. Co.*, 352 U. S. 59, 62-65 (1956).

chinery has been created; only clear and affirmative Congressional action will produce such a result.[6]

II.

Congress Has Not Abrogated Equity's Inherent Power to Grant Ancillary Injunctive Relief in the Circumstances Here Presented

The court below read Section 15(7) of the Interstate Commerce Act as denying to the courts the power to preserve the status quo after the Commission's power of suspension has been exhausted. Viewing the statute as "'model of clarity" (R. 121), it conceived its task to be only to give a literal construction to the words used by Congress. We disagree.[7] In our view, the court below mistakenly read statutory language intended to apply only to the Interstate Commerce Commission as applying also to district courts in the exercise of their equity jurisdiction.

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[6] "The better view thus appears to be that courts of equity, upon the request of an appropriate party, do have jurisdiction to provide temporary injunctive relief during the pendency of hearings before an administrative agency, even though the statute setting up the agency does not specifically so provide. This appears to be in accord with the recent judicial trend." (49 Col. L. Rev. 1128 (1949)).

[7] The dangers of an attempt to find legislative intention through a literal reading of statutory language without reference to its context, the legislative setting in which it and its component parts were enacted, or the incongruous results to which a blind reliance on it would lead, have often been pointed out. *Markham* v. *Cabell*, 326 U.S. 404, 408-09 (1945); *Crosse & Blackwell Co.* v. *Federal Trade Commission*, 262 F.2d 600, 605-06 (4th Cir. 1959); *Peter Pan Fabrics, Inc.* v. *Martin Weiner Corp.*, 274 F.2d 487, 489-90 (2nd Cir. 1960); *cf. Boston Sand Co.* v. *United States*, 278 U.S. 41, 48 (1928); *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, 444 (1955).

Section 15(7) provides that the Interstate Commerce Commission can suspend a rate only for a maximum of seven months beyond the time when it "would otherwise go into effect," and that if the Commission does not reach a final decision within the seven months, the proposed rate "shall go into effect at the end of such period." In assessing the intention of Congress in using this statutory language, it is important to note that the second of these quoted phrases found its way into the Interstate Commerce Act 10 years after the first. The legislative history of the statute in which the first phrase had its origin (the Mann-Elkins Act of 1910, 36 Stat. 552) indicates that Congress had no intention of ousting any previously existing equity jurisdiction. The second phrase was added by the Esch-Cummins Act of 1920 (41 Stat. 487) in circumstances which negative any Congressional intention of there dealing with such jurisdiction.

The Mann-Elkins Act amended the then existing Section 15 of the Interstate Commerce Act to empower the Commission, for the first time, to order suspension of a proposed rate or other practice, "but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect," plus a further period, if its hearing was not yet completed, of not to exceed six months.

This language, standing alone, imposes a time limitation only on the Commission. It is entirely consistent with the continued jurisdiction of an equity court to grant ancillary relief, after the Commission's own power of suspension is exhausted. Clearer language than this would be required to deprive equity courts of their traditional ancillary jurisdiction. *Scripps-*

Howard Radio, Inc. v. *Federal Communications Commission, supra.*

Moreover, the legislative setting and history of the Mann-Elkins Act indicate that Congress envisaged the possibility of ancillary relief by equity courts after the Commission's power of suspension was exhausted, and did not intend to deprive the courts of jurisdiction to grant such relief. Prior to the Mann-Elkins Act, as noted above, injunctions had been granted in a number of cases to prevent new rates from going into effect until the Commission had passed on their lawfulness. Some of the courts issuing these injunctions had required sizable bonds, and it was felt that litigation in the courts represented an expensive and difficult remedy. See 45 Cong. Rec. 5844, 5847 (1910).[8] This led to general agreement in Congress that suspension authority should be given the Commission, but disagreement as to what should be its extent. One group, led in the Senate by Senator Elkins, chairman of the Committee on Interstate and Foreign Commerce, wanted to give the Commission such authority for only a limited period in order to encourage it to decide cases as speedily as possible. A second group, led by Senator Cummins, a member of the Committee, wanted to give the Commission authority to suspend until it reached a final decision on the merits. These different approaches were reflected in two rival Senate bills, the Elkins bill, S. 5106, 61st Cong., 2d Sess. (1910) (the pertinent provisions being in Section 9) and the Cummins bill, S. 3776, 61st Cong., 2d Sess. (1910) (the pertinent provisions being in Section 5).

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[8] Relevant excerpts from the debates are shown in Appendix C. See Representative Needham's remarks, Appendix C(1).

The proponents of limited suspension prevailed, but in so doing made clear their belief that if the Commission could not act during the suspension period, injunctive relief could be obtained from the courts in a proper case. The Senate debates indicated some disagreement as to the existence of equitable jurisdiction in such a situation, but made clear that there was no intention to abolish that jurisdiction if it existed. On the contrary, the proponents of limited suspension sought to allay the fears of those favoring indefinite suspension by suggesting specifically that courts could act in appropriate cases to prevent rates from going into effect after the Commission's power to do so was exhausted.[9] During debate on an amendment adding six months to the period for which the Commission could suspend, Senator Jones, its author, stated that at the end of the period the suspended rate would go into effect (45 Cong. Rec. 6916-6917), but he was obviously speaking solely with reference to the authority of the Commission to suspend. This is made clear by the fact that when Senator LaFollette later offered an amendment giving the Commerce Court power to suspend rates, the amendment was defeated after the chairman of the Committee, Senator Elkins, indicated that if the purpose of the amendment was to make possible judicial suspension of rates after the Commission's power was exhausted, it was unnecessary because the courts would have such jurisdiction without it.[10]

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[9] See, in this connection, the colloquy between Senator Cummins and Senator Heyburn at 45 Cong. Rec. 6777, Appendix C(2).

[10] See their colloquy at 45 Cong. Rec. 7260-7263, including Senator Elkins' statement that "Anyone can go into court in a case where irreparable injury is about to be perpetrated and get an injunction." Appendix C(3).

The Esch-Cummins Act of 1920 clearly was not intended to change the situation with respect to the availability of ancillary judicial relief. The pertinent language which it substituted in Section 15 of the Interstate Commerce Act was as follows:

> "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension, as above stated, the Commission may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty

> days, the proposed change of rate, fare, charge, classification, regulation, or practice shall go in effect at the end of such period . . ." (41 Stat. 486-487 (1920)).

The effect of this statute was thus to reduce the maximum period for which the Commission could suspend from 120 days plus an additional 6 months to 120 days plus an additional 30 days. The reason for this reduction was, as made clear during Congressional debate, that the same statute created a new transportation board to assume some of the functions previously performed by the Commission, and it was felt that the Commission therefore could dispose more rapidly of cases before it.

That Congress in enacting the Esch-Cummins Act had no intention of legislating with respect to the powers of the courts is indicated both by the statutory language and by its legislative history. As to language, the words "the proposed change of rate . . . shall go into effect at the end of such period" were so placed as to follow directly words in the same sentence dealing with the power of suspension to be exercised by the Commission, indicating a reference to a sequence of events in terms of Commission action alone. As to history, the Esch-Cummins Act was the out-growth of two similar bills in the House and Senate. The House bill was the one enacted, but Section 44 of the Senate bill contained language almost identical with that quoted above. In explaining this portion of Section 44 on the Senate floor, Senator Cummins, at this time the chairman of the Senate Committee on Interstate and Foreign Commerce, stated:

> "The next section to which I call your attention is section 44, and in that section the only change

> that is of importance at this moment is in the length of time that the commission may suspend rates which are filed by the carrier" (59 Cong. Rec. 143 (1919)).[11]

If the Committee had intended to take away any of the equitable powers of the courts, its chairman certainly would not have said that the change in the length of time the Commission might suspend rates was the only change of importance effected by the change in language.

The maximum period for which the Commission may suspend was increased to seven months by the Mayfield-Newton Act of March 4, 1927 (44 Stat. 1446). An incidental result of the substitution of a seven-months' suspension period for an initial period of 120 days followed by a possible further period of 30 days was to begin a new sentence with the words "If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate . . . shall go into effect at the end of such period" (44 Stat. 1448 (1927)). The fortuitous inclusion of this language in a separate sentence no longer containing a reference to the Commission's suspension power has tended to give it, when read without knowledge of its history, an independent flavor that does not reflect the Congressional intent. Congress, when originally adopting it, had no intention of interfering with the jurisdiction of an equity court to intervene after the suspension power of the Commission was exhausted, and such an intention should not now be read into it.

That Congress did not intend to oust equity jurisdiction in the type of situation here presented is fur-

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[11] See Appendix C(4) for complete text.

ther indicated by a consideration of Section 15(7) in the light of related statutory provisions. Such provisions include the National Transportation Policy, that portion of Section 22(1) of the Interstate Commerce Act which preserves common law remedies, and the statute providing for judicial review of Interstate Commerce Commission decisions.

The National Transportation Policy, adopted by Congress in 1940, is

> ". . . to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8, 12, 13 and 19 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy". (54 Stat. 899, 49 U.S.C., Note preceding § 1).

This Policy was enacted as part of the Transportation Act of 1940 (54 Stat. 899), which placed water carriers under the jurisdiction of the Commission. While the legislation was under consideration, fears

were expressed in Congress that the Commission was "railroad-minded" and would so regulate water carriers as to prevent them from competing effectively. The National Transportation Policy was adopted for the purpose of setting these fears at rest. As stated in *Arrow Transportation Co.* v. *United States, supra:*

> "The legislative history of this statutory provision . : . shows that many members of Congress were apprehensive that the Commission would so exercise the regulatory powers conferred by the Transportation Act of 1940 as to prevent water carriers from competing effectively with the railroads. The act was passed only after repeated assurances that these fears were groundless because the Commission would be bound by the provisions of the National Transportation Policy.
>
> "There was extensive debate as to whether the National Transportation Policy prescribed standards to which the courts would require the Commission to adhere. To eliminate any question on this score, Congress adopted the Whittington amendment, which provides that: 'All of the provisions of this (the Interstate Commerce) Act shall be administered and enforced with a view to carrying out the above declaration of policy' (54 Stat. 899 (1940), 49 U.S.C.A. note preceding Section 1).
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> "Congress thus made clear that it was imposing on the Commission a positive and active duty to administer each provision of the act in such a way as to preserve the inherent advantages of each mode of transportation." (176 F. Supp. at 416).

In short, Congress, with the issue squarely before it, took action to protect water carriers from "destructive competitive practices" and to insure that "a national transportation system by water . . ." and other

means should be preserved. Certainly, this announced Congressional purpose should be taken into account in construing Section 15(7), where such construction will go far to determine whether the Congressional purpose of outlawing the very type of destructive competitive practices here being employed is to be accomplished or defeated. *Cf. Tiger* v. *Western Investment Co.*, 221 U.S. 286, 309 (1911); *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, 277 (1942); *United States* v. *Stewart*, 311 U.S. 60, 64-65 (1940). Here, the Commission, after stating in writing that there was reason to believe that the tariffs would "constitute unfair and destructive competitive practices in contravention of the National Transportation Policy", exercised fully its statutory authority to prevent the proposed rates from going into effect by ordering them suspended for the maximum period for which it could order suspension. The hearings were not completed within the suspension period; the Commission's suspensory jurisdiction had been invoked and spent and the Commission was powerless further to prevent the rates from becoming effective; some of the petitioners were faced with impending bankruptcy; and the National Transportation Policy was about to be emasculated. The Court below, however, in the face of the Congressional declaration that "all provisions of the Act" shall be administered and enforced to carry out the Policy, interpreted Section 15(7) of the Act as rendering an equity court helpless to prevent the violation of the Policy and the irreparable injury such violation would inevitably inflict. We think that in so doing it departed from established principles of statutory construction.

Also of relevance in the construction of Section 15(7) is that part of Section 22(1) of the

Interstate Commerce Act (24 Stat. 387; 49 U.S.C. § 22(1) which provides that nothing in the Act "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." This language was obviously used in a broad sense, and "remedies . . . at common law" include equitable remedies such as injunctions. *Knapp, Stout & Co.* v. *McCaffrey*, 177 U.S. 638 (1900); *Martin* v. *Superior Court*, 176 Cal. 289, 168 Pac. 135 (1917).

Southern claims, and the Court of Appeals held, that at common law the railroads were at liberty to maintain unreasonably low rates "provided they were non-discriminatory" (R. 122). The key to that conclusion is the proviso. The proposed rates are grossly discriminatory against petitioner city of Guntersville and shippers located there and are plainly preferential to localities and shippers at Memphis, St. Louis, and other Ohio and Mississippi River ports. By according those ports and shippers greatly reduced rates while denying them at Guntersville, Southern would kill Guntersville as a barge grain reshipping port and would bankrupt elevators located there. Southern has stated on the record that it would make available from Guntersville rates constructed upon the same "formula" as the proposed rates. But, that formula is so constructed that even if such rates were published they would not cure the patent discrimination. The scheme of an extremely low per ton-mile factor, coupled with a uniform terminal factor and heavily influenced on short hauls by a 240-cent minimum rate, would still result in a relationship highly discriminatory to the Tennessee River ports.

In addition, the proposed rates are grossly discriminatory against receivers who are not in a position to

make use of multiple-car shipments, and whose rates would be two and one-half times those paid by their competitors receiving grain in multiple-car lots.

Equity exercised jurisdiction to restrain discriminatory rate practices at the suit of aggrieved shippers prior to enactment of the Interstate Commerce Act.[12] Railroads were regarded as recipients of special privileges, subject to a special obligation to exercise such privileges in the interest of the public, and under a common law obligation to transport commodities at reasonable rates without discriminating among shippers. *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U.S. 386 (1892). They "exercise a sort of public office, and have duties to perform in which the public is interested". *Munn* v. *Illinois*, 94 U.S. 113, 130 (1876).

At common law, some of the petitioners, at least, would thus have had a legal right to be protected from rail rates, high or low, which discriminated against them in favor of other shippers and communities. It seems unnecessary, therefore, to consider whether a competing carrier had a common law right to be protected against unfair and destructive competition—from below-cost rates published by a competitor—

[12] In *Coe & Wilson* v. *Louisville & N. R. Co.*, 3 Fed. 775 (C.C. M.D. Tenn. 1880), the railroad was enjoined from discriminating among receivers of livestock: "If the railroad corporation possess such right (to be free of judicial restraint), they can destroy a refractory manufacturer, exterminate or very materially cripple competition, and in large measure monopolize and control these several branches of useful commerce, and dictate such terms as avarice may suggest. We think they possess no such power to kill and make alive" (p. 779). See also *Monacho* v. *Ward*, 27 Fed. 529 (C.C.S.D. N.Y. 1886) (common carrier steamship line enjoined from exacting higher rates from shippers who refused to patronize it exclusively).

which Congress, in the National Transportation Policy, has subsequently declared unlawful. Equity had jurisdiction prior to the Act to restrain discriminatory rates, and the express restriction of Section 22(1) of the Act establishes that Congress intended to preserve the pre-existing equitable remedy in a case like this where alternative remedies available from the Commission have been exhausted.[13]

The third related statute mentioned above, authorizes judicial review of Commission decisions, specifically empowering the courts to stay the operation of a proposed new rate after a Commission decision upholding it and pending judicial determination as to whether the decision was correct (62 Stat. 970; 28 U.S.C. § 2324-2325). It would be incongruous indeed if such a proposed rate could not also be judicially stayed prior to a final Commission decision, while the Commission's finding that there is reason to believe the proposed rate unlawful is in effect. The need for protecting those affected by the proposed rate is as great in the one case as in the other.

[13] This Court held in *Texas & P. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), that section 22(1) does not authorize a court to oust Commission jurisdiction by holding unreasonable a rate whose reasonableness has never been submitted to the Commission at all, since such authorization "would be absolutely inconsistent with the provisions of the act" and "the act cannot be held to destroy itself" (p. 446). But this is only another way of saying that primary jurisdiction is in the Commission. The traditional remedy of a temporary injunction to prevent irreparable injury by preserving the status quo pending a determination of the reasonableness of a rate, where the Commission's power of suspension has been exhausted, would seem clearly to have been saved by Section 22(1) if it is not to be read out of the statute altogether.

In summary, a basic purpose of Congress in the Interstate Commerce Act and related statutes was to protect parties who would be injured by improper action of a common carrier. Section 15(7) should be construed to help accomplish the Congressional purpose and not to defeat that purpose through a narrow and technical reading of language without reference to its origin and development.

The only case we have found involving the precise issue here presented is *Pacific Inland Tariff Bureau* v. *United States*, *supra*. There the Commission had suspended proposed rate reductions for the full seven months period. A few days before the suspension period expired, plaintiffs sought a status quo injunction pending final action by the entire Commission on plaintiff's motion to reconsider an order of Division 2. A single judge temporarily enjoined the railroads from putting the reduced rates into effect. Several months later, the Commission affirmed Division 2's actions and plaintiffs promply sought judicial review. The railroads' claim that the single judge lacked power to issue the status quo injunction at the end of the suspension period was rejected by the three-judge court. See also *Cantlay & Tanzola* v. *United States*, *supra*.

III.

To Construe Section 15(7) as Prohibiting Ancillary Injunctive Relief Would Raise Grave Constitutional Difficulties

If the language of Section 15(7) that rates "shall go into effect at the end of such period" is construed to forbid a status quo injunction where, as here, that injunction is petitioners' only remedy to prevent their businesses from being destroyed, such construction

would raise grave constitutional difficulties.[14] Statutes, of course, are to be construed to avoid constitutional difficulties, and, despite broad language in a statute, courts will "apply the familiar canon which makes it our duty, of two possible constructions, to adopt the one which will save and not destroy. We cannot attribute to Congress an intent to defy the Fifth Amendment or 'even to come so near to doing so as to raise a serious question of constitutional law'" *Anniston Manufacturing Co.* v. *Davis*, 301 U.S. 337, 351-2 (1937).[15]

That a business or occupation is property within the protection of the due process clause of the Constitution is well settled. *Liggett Co.* v. *Baldridge*, 278 U.S. 105, 111 (1928); *Frost* v. *Corporation Commission*, 278 U.S. 515, 519-20 (1929). If Section 15(7) be construed as prohibiting ancillary injunctive relief where, as here, the Commission's jurisdiction to pre-

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[14] *Bronemann* v. *United States*, 138 F.2d 333, 337 (8th Cir. 1943); *Miller* v. *Howe Sound Min. Co.*, 77 F. Supp. 540, 543-5 (E.D. Wash. 1948); *Frye & Co.* v. *Vierhus*, 12 F. Supp. 597, 600 (W.D. Wash. 1935); *Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 257 (2nd Cir. 1948), *cert. denied*, 335 U.S. 887 (1948); *Eastern States Petroleum Corp.* v. *Rogers*, 280 F.2d 611, 614 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 891 (1960); *A.P.W. Paper Co. Inc.* v. *Riley*, 12 F. Supp. 738, 741-2 (N.D. N.Y. 1935); *Inland Milling Co.* v. *Huston*, 12 F. Supp. 554, 555 (S.D. Ia. 1935); *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 431 (1931); *Cary* v. *Curtis*, 3 How. (U.S.) 236, 250 (1845); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 682 (1930); *Oklahoma Natural Gas Co.* v. *Russell*, 261 U.S. 290, 293 (1923); *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U.S. 196, 201, 204-5 (1924); *Porter* v. *Investors Syndicate*, 286 U.S. 461, 469, 470-1 (1932); Hart & Wechsler, *Federal Courts and the Federal System*, pp. 288-340 (1953).

[15] See also: *United States ex rel. Atty. Gen.* v. *Delaware & Hudson Co.*, 213 U.S. 366, 407-8 (1909); *Porter* v. *Investors Syndicate*, *supra*, 286 U.S. 461, 470 (1932); *Lockerty* v. *Phillips*, 319 U.S. 182, 188-9 (1943); *Lynch* v. *United States*, 292 U.S. 571, 586-7 (1934); *Pennsylvania* v. *Nelson*, 350 U.S. 497, 509-10 (1956).

vent the rates from becoming effective has been exhausted, then petitioners' businesses will be destroyed, and their properties and facilities, and Arrow's certificate as a common carrier will be rendered worthless, all without adequate legal remedy (R. 58), and all without administrative or judicial determination of the lawfulness of the rail rates causing such destruction. Such a result would constitute deprivation of property without due process of law. *Oklahoma Natural Gas Co.* v. *Russell, supra,* 261 U.S. 291, 293 (1923); *Pacific Tel. & Tel. Co.* v. *Kuykendall, supra,* 265 U.S. 196, 201, 204-05 (1924); *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* 134 U.S. 418, 458 (1890); *Pacific Inland Tariff Bureau* v. *United States, supra,* 129 F. Supp. 472, 477 (D. Ore. 1955). See also Daniel Webster's argument in *Trustees of Dartmouth College* v. *Woodward,* 4 Wheat. (U.S.) 518, 581 (1814).

CONCLUSION

The Court below erred in holding that the District Court did not have jurisdiction to issue a temporary injunction to maintain the status quo in the situation presented here. It should have declared that when the Commission's powers are exhausted, a federal equity court, upon a showing of irreparable loss, damage, and injury, may temporarily enjoin presumptively unlawful rates at the end of the suspension period in aid of the Commission's jurisdiction and in furtherance of the National Transportation Policy.

Its error in this regard resulted from the failure to heed the basic principles of statutory construction set out by Mr. Justice Stone in *United States* v. *Morgan,* 307 U.S. 183 (1939):

> . . . in construing a statute setting up an administrative agency and providing for judicial review

> of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim (p. 191).

We respectfully submit that the judgment of the Court of Appeals should be reversed and the case remanded to the District Court for further proceedings.

Respectfully submitted,

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